Supreme Court, U.S.
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92-151
No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

CALIFORNIA HOUSING SECURITIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR WRIT OF CERTIORARI

LEONARD BICKWIT, JR.
Counsel of Record
ALAN I. HOROWITZ
SUSAN GINSBURG
MILLER & CHEVALIER, Chartered
Metropolitan Square
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 626-5800
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether the government effected a taking within the meaning of the Fifth Amendment when, acting under the authority of federal banking laws, it physically seized and permanently occupied a thrift institution and took over the operation of its business.

PARTIES AND AFFILIATED COMPANIES

All parties to the proceeding are listed in the caption. California Housing Securities, Inc., has no parent company or subsidiaries (other than a wholly owned subsidiary).

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PETITION FOR WRIT OF CERTIORARI

California Housing Securities, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-11a) is reported at 959 F.2d 955. The order of the Claims Court (App. 12a-13a) is unreported. The opinion of the Claims Court in *American Continental Corp. v. United States* (App. 14a-31a), which formed the basis for the Claims Court's order in this case, is reported at 22 Cl. Ct. 692.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1992 (App. 1a). On June 12, 1992, the Chief Justice extended the time to petition for a writ of certiorari to and including July 22, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

"Nor shall private property be taken for public use without just compensation."

STATEMENT

1. Petitioner California Housing Securities, Inc. ("CHS") is the sole shareholder of Saratoga Savings and Loan Association ("Saratoga"), a thrift institution chartered by the State of California in 1983. In accordance with California law that required all state-chartered thrifts to participate in the federal deposit insurance program, Saratoga obtained deposit insurance from the Federal Savings and Loan Insurance Corporation ("FSLIC"). App. 1a-2a.

On November 8, 1989, the Office of Thrift Supervision (OTS), an arm of the Department of the Treasury with regulatory authority over thrifts, placed Saratoga in conservatorship. It appointed as conservator the Resolution Trust Corporation (RTC), another government agency that had assumed the regulatory authority of the now-defunct FSLIC. OTS took this action pursuant to a statutory provision that authorized OTS to appoint the RTC as conservator or receiver of a federally-insured state savings association under certain conditions, including "substantial dissipation of assets or earnings due to . . . any violation of any law or regulation; or . . . to any unsafe or unsound practice" or "having substantially insufficient capital." 12 U.S.C. § 1821(c)(5)(B), (C) (Supp. II 1990); *see also* 12 U.S.C. § 1464(d)(2)(A)(ii), (iii) (Supp. II 1990).[1]

[1] These provisions were enacted as part of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, which established OTS and RTC as regulatory agencies. There were similar provisions in prior law that authorized the Federal Home Loan Bank Board to appoint the

The next evening, government agents entered Saratoga's main office in San Jose and its California branch offices and delivered a letter informing Saratoga that the "Conservator is now taking possession of the Association." App. 4a; C.A. Br. App. 22. The agents placed uniformed guards around the offices and took possession and control of Saratoga's premises and operations. Plaintiff's Statement of Uncontroverted Facts, ¶ 3. At the time of the seizure, Saratoga had a net worth of approximately $16 million. First Amended Complaint, ¶ 19.

Pursuant to 12 U.S.C. § 1821(c)(7) (Supp. II 1990), Saratoga then brought suit in federal district court, arguing that the RTC's appointment as conservator was invalid because Saratoga had not violated any laws or engaged in any unsafe or unsound practices and the net worth more than exceeded the minimum requirements. *Saratoga Savings & Loan Ass'n v. Ryan*, Civ. Action No. 89-3305 (D.D.C. filed Dec. 8, 1989); *see also* 12 U.S.C. § 1464(d)(2)(E) (Supp. II 1990). The district court, however, took no action in that suit. On May 24, 1990, the OTS appointed the RTC as receiver of Saratoga. One week later, the RTC liquidated most of the assets and liabilities that made up Saratoga's business. App. 14a.

2. Citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), CHS brought this suit in the Claims Court seeking just compensation on the ground that the government's permanent occupation of Saratoga's property and the takeover of its business constituted a

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FSLIC as receiver or conservator. *See* 12 U.S.C. § 1464(d)(6)(A)(ii), 1729(c) (1988). Congress first gave the FSLIC the power to appoint a conservator or receiver in these circumstances in 1982. *See* Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 122(d), 96 Stat. 1482.

The FIRREA provisions have since been amended by the Comprehensive Deposit Insurance Reform and Taxpayer Protection Act of 1991, Pub. L. No. 102-242, § 131(a), (d)(1), 105 Stat. 2270, 2271 (Dec. 19, 1991), but the government powers invoked here were not restricted by the changes.

per se taking under the Fifth Amendment. The court rejected the contention and granted the government's motion for summary judgment. App. 12a-13a. The court's brief order stated that the decision was compelled by the court's reasoning in another decision it had rendered a few days earlier in a similar case brought by the owner of a different thrift, *American Continental Corp. v. United States*. *Id.*

In neither case did the Claims Court deny that the government had taken permanent, physical possession of the business and all its property. Indeed, the court expressly assumed that "the government's actions herein can at least be argued to have resulted, incidently, in some degree of 'physical occupation' . . . and, in addition, that occupation can be argued in some sense to be 'permanent.'" App. 30a. The Claims Court held, however, that the *per se* taking rule for permanent physical seizures did not apply because the framework of banking regulation reduced the owners' "traditional expectations as to their ability 'to possess, use, and dispose of' their property or as to their right to compensation." *Id.* at 28a (quoting *Loretto*, 458 U.S. at 435). The court asserted that this Court in *Loretto* had "adopted a *per se* approach because the government's actions interfered with expectations that the property owners had (and in a typical situation would have) based on their ownership of a 'physical thing.'" *Id.* By contrast, the court found that this case "involves a regulatory action in a highly regulated industry in which the government took actions that reasonably should have been expected by plaintiffs." *Id.* at 31a.

The court explained that the existence of a statute authorizing the government to take over a thrift under certain circumstances meant that "the government's assuming control of [a thrift] could not possibly have interfered with plaintiffs' reasonable investment-backed expectations." *Id.* at 22a. The court added that it made no difference that Congress did not authorize the govern-

ment to appoint itself as conservator until 1982, long after many thrifts had joined the federal deposit insurance program. The court ruled that "when an investment is made in such a highly regulated industry, to be reasonable, expectations must be based not only on then-existing federal regulations but also on the recognition that there may well be related changes in the regulations in the future." *Id.* at 23a. Because plaintiffs "were on reasonable notice as to what the 'rules of the game' were, or reasonably could be, in the highly regulated banking industry," the court concluded that "fairness and justice require a decision that no taking has occurred." *Id.* at 25a.

The Federal Circuit affirmed. App. 1a-11a. Like the Claims Court, the court of appeals did not dispute that "the government entered and took possession of Saratoga's property," but refused to apply the *per se* rule for physical takings. App. 6a. The court of appeals ruled that Saratoga's property rights were not sufficient to develop an expectation of compensation for a government seizure under the banking statutes because Saratoga did not have the "most valued property right . . ., the right to exclusive possession." *Id.* at 7a. Specifically, "Saratoga lacked the fundamental right to exclude the government from its property at those times when the government could legally impose a conservatorship or receivership on Saratoga." *Id.* at 7a-8a. The court of appeals emphasized that Saratoga had voluntarily entered the savings and loan business in California, thereby subjecting itself to the regulatory burdens imposed on holders of federal deposit insurance with "notice that Saratoga might be subjected to different regulatory burdens over time." *Id.* at 9a. Finally, citing *Ruckelshaus v. Monsanto Corp.*, 467 U.S. 986, 1007 (1984), the court observed that the government's seizure could not be viewed as a taking because it arose out of a voluntary arrangement through which Saratoga enjoyed the benefit of federal deposit insurance in exchange for giving the gov-

ernment the right "to place [it] in conservatorship or receivership when warranted." App. 9a.

REASONS FOR GRANTING THE PETITION

The court of appeals has effectively held that the government is free to occupy a person's property and seize control of his business, without paying him any compensation for lost value, so long as the government action is authorized by a regulatory scheme. In so holding, the court of appeals has unjustifiably departed from a settled principle of this Court's takings jurisprudence—namely, that the government commits a *per se* taking when it permanently occupies or takes title to private property. This Court has definitively and repeatedly stated that such action intrudes so deeply into the core of property rights guaranteed by the Constitution that the government must pay just compensation, regardless of the extent to which the person's expectations may have been tempered by a prior government assertion of authority to effect the seizure.

The court of appeals' error has potentially broad significance. Because it is the exclusive appellate forum for review of all takings claims brought under the Tucker Act, the Federal Circuit's decision will be controlling precedent in many takings cases not only in the banking area, but also in a variety of other contexts involving government seizure of regulated businesses. If allowed to stand, the court of appeals' erroneous decision can be expected to have a substantial adverse effect on the business climate and the willingness of investors to commit their funds to ventures that are subject to government regulation.

1. It is by now well settled that "[w]here the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation." *Yee v. City of Escondido*, 112 S. Ct. 1522, 1526 (1992). "[A] permanent physical occu-

pation of property . . . is *per se* a taking for which compensation must be paid." *FCC v. Florida Power Corp.*, 480 U.S. 245, 250 (1986). *See also Lucas v. South Carolina Coastal Council*, 60 U.S.L.W. 4842, 4845 (June 29, 1992); *United States v. Sperry Corp.*, 110 S. Ct. 387, 393 (1989); *Nollan v. California Coastal Commission*, 483 U.S. 825, 831-32 (1987).

In its detailed exposition of the development of this *per se* rule (*see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426-35 (1982)), this Court made clear that the rule encompasses a government seizure and operation of a private business. The Court explained that it had long ago held that the government's seizure and operation of a coal mine to prevent a wartime strike constituted a taking because there had been " 'an actual taking of possession and control.' " *Id.* at 431 (quoting *United States v. Pewee Coal Co.*, 341 U.S. 114, 116 (1951) (plurality opinion)).

The Court further explained that the physical occupation and control of the coal mine were critical to the finding of a taking in *Pewee Coal*, contrasting that case with the finding of no taking in *United States v. Eureka Mining Co.*, 357 U.S. 155 (1958), where the government shut down some gold mines, but " 'did not occupy, use, or in any manner take physical possession of the gold mines or of the equipment connected with them.' " 458 U.S. at 431-32 (quoting 357 U.S. at 165-66). In *Pewee Coal*, however, the seizure of the mines made them "government facilities 'in as complete a sense as if the Government held full title and ownership.' " 341 U.S. at 116 (quoting *United States v. United Mine Workers*, 330 U.S. 258, 284-85 (1947)). It therefore "follow[ed] almost as a matter of course" that the government " 'took' Pewee's property and . . . became liable under the Constitution to pay just compensation." 341 U.S. at 116-17.

This case falls squarely within the framework of these decisions. The government physically seized Saratoga's

offices, wrested total control of the business operation from its owners, and proceeded to run the thrift until liquidation of most of its assets. The letter to Saratoga's owners informing them of the appointment of the RTC as conservator expressly threatened "criminal penalties for refusal to comply with the Conservator's demand for possession of the property, business, and assets of [Saratoga]." C.A. Br. App. 22; *see* App. 27a n.7. There can thus be no doubt that the government "required" Saratoga to submit to a permanent physical occupation of its property, which is the hallmark of a physical taking. *See Yee v. City of Escondido*, 112 S. Ct. at 1528. Indeed, this is an even stronger case for the application of the *per se* taking rule than *Pewee Coal*. In that case, the government allowed Pewee's management to remain in place and operate the mine as agents for the government and the government's control lasted for only a few months before the mine was fully returned to its owners. Here, the seizure was final. The government ousted Saratoga's management and operated the thrift itself until it liquidated most of the assets in a fire sale that left no business to return.

2. The court of appeals did not dispute that "the government entered and took possession of Saratoga's property" (App. 6a), itself characterizing the action as the "government's occupation and seizure of Saratoga" (*id.* at 11a). In light of that fact, the court should have applied this Court's *per se* rule and ruled that the government action was a compensable taking to the extent of Saratoga's value. Instead, the court held that the *per se* rule is inapplicable because the "expansive" system of thrift industry regulation eliminated Saratoga's expectation that its business would not be seized by the government. *Id.* at 8a. That ruling rests on a basic misconception of this Court's takings jurisprudence and, if allowed to stand, will open the door for government regulators to interfere with private property rights while

avoiding the Fifth Amendment obligation to pay just compensation.

Examination of a private party's historic, investment-backed expectations is an integral part of this Court's familiar three-part inquiry into whether government *regulation* amounts to a taking. *See, e.g., Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225-27 (1986); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124-25 (1978). But the *per se* taking rule that governs physical seizures and business takeovers does not entail the same inquiry. This case does not involve the impact of government regulation on property rights; rather, the complaint is that the government permanently seized control of Saratoga's property and business operation. This Court has determined that such government action is so destructive of basic property rights that it automatically requires just compensation under the Fifth Amendment. Where there is a permanent physical invasion of private property, "no matter how minute the intrusion, and no matter how weighty the public purpose behind it, [this Court has] required compensation." *Lucas v. South Carolina Coastal Council*, 60 U.S.L.W. at 4845. The court of appeals simply failed to respect the sharp distinction that this Court has drawn between physical and regulatory takings.

The principle described above does not suggest that the government lacks authority to engage in physical takings of property or takeovers of businesses in the public interest, only that it must pay compensation to the property owner. Thus, for example, although the business seizures discussed in *Pewee Coal* were praised as a "most useful administrative device" to meet wartime emergencies, the merit of the government action did not erase the obligation to pay just compensation. 341 U.S. at 119 (Reed, J., concurring). Similarly here, the banking statutes authorize the government to appoint the RTC as conservator of a thrift that still has value, but those statutes cannot relieve the government of the

obligation to compensate the owner for that physical taking.

The court of appeals' theory—that pervasive government regulation of an industry can reduce a person's expectations sufficiently to eliminate the obligation to pay just compensation for a physical taking—does not withstand analysis. As the D.C. Circuit recently stated in criticizing a similar contention, the argument "prove[s] far too much" because "almost any entity could be said to have a reasonable expectation of governmental intrusion." *Colorado Springs Protection Credit Ass'n v. Farm Credit Administration*, Nos. 91-5077, 91-5078, 91-5079, slip op. at 14 n.8 (June 26, 1992). Under the Federal Circuit's approach, if Congress were to pass a law specifically conferring the authority to effect a physical taking, not only would the enactment authorize the government action, it also would defeat the right to compensation because the property owner would have no "expectation" of freedom from government intrusion. Plainly, that is not the law. Landowners know that the government has the power of eminent domain and therefore that their property is subject to confiscation if needed for certain public uses. That knowledge does not affect their right to be compensated for the confiscation. The governing principle is no different in the context of a regulated industry.

The court of appeals' approach actually would go even further. It would allow regulations enacted after a business has already been in operation to vitiate its right to compensation on the theory that businesses operating in regulated industries are "on notice that [they] might be subjected to different regulatory burdens over time." App. 9a. This incursion into Fifth Amendment protection has no apparent limits and cannot justify a physical taking. The idea that a person's title to real property, or his ownership of a business, is subject to an "implied limitation" that the government may later decide to take full control of the property "is inconsistent with the his-

torical compact recorded in the Takings Clause." *See Lucas v. South Carolina Coastal Council*, 60 U.S.L.W. at 4848.

The court of appeals fails in its effort to distinguish this Court's controlling cases on the basis of the property owner's expectations. *See* App. 10a-11a. For example, in *Pewee Coal*, the company was as aware of the possibility that it would be taken over by the government in certain circumstances as was Saratoga. As this Court explained in *United States v. United Mine Workers*, 330 U.S. at 262-63 n.1, the seizure of the mines was made pursuant to a statute that "authorize[d] the seizure of facilities necessary for the war effort if and when the President finds and proclaims that strikes or other labor disturbances are interrupting the operation of such facilities." Likewise, the claimant in *Loretto*, a landlord, also operated in a heavily regulated industry with detailed and evolving rules governing the relative rights of landlords, tenants, and public utilities.

It is particularly unfair to invoke the statute's effect on business expectations as a ground for denying just compensation because the statutory scheme was not implemented in this case as Congress intended. The statute does empower the government to appoint the RTC as conservator if a thrift violates the law, engages in "unsafe or unsound" practices, or has "substantially insufficient capital." 12 U.S.C. § 1821(c)(5)(B), (C) (Supp. II 1990). But the statute also grants the right to immediate judicial consideration of the validity of the findings justifying the appointment. *See* 12 U.S.C. § 1821(c)(7) (Supp. II 1990). CHS sought to invoke that right, but was thwarted because the district court never made a ruling. Thus, the statute gave no reason to anticipate the property deprivation that actually occurred—a government seizure and ultimate liquidation of a valuable private business without any judicial finding of the conditions justifying takeover.

3. Nor does the court's brief reference to *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984) (*see* App. 9a-10a), support its decision. In that case, a federal statute required companies to furnish the government with certain test data in order to register pesticides. This Court held that statutory provisions concerning the future use of that data—such as a provision allowing the data to be used by the government in connection with other applications after 10 years had elapsed—did not effect a taking. Apparently, the court of appeals' reference is intended to suggest that, in exchange for obtaining federal deposit insurance, Saratoga voluntarily agreed to an uncompensated seizure of its business under certain circumstances. This suggestion is erroneous for several reasons.

First, the premise that Saratoga agreed to a conservatorship in exchange for deposit insurance is mistaken. Section 403(b) of the National Housing Act, as amended, expressly spells out a long list of conditions attached to a state-chartered thrift's participation in the federal deposit insurance program. *See* Pub. L. No. 479, 48 Stat. 1246 (1934), codified at 12 U.S.C. § 1726(b). That list nowhere mentions appointment of a conservator or acceding to permanent occupation of the thrift's business premises as a condition of receiving insurance. Second, even if Saratoga is viewed as having voluntarily accepted the statutory provision governing conservatorship, that would not alter the result. The statute authorizes the appointment of a conservator, but it nowhere states that the savings institution will not be compensated for the value of its seized property.

Finally, there is no comparison between the property interest voluntarily relinquished in *Monsanto* and the property interest involved here. In *Monsanto*, the company retained the ability to use its data, and even the right to be compensated for its use by others for 15 years; what it gave up was a relatively small segment

of its bundle of property rights. Here, by contrast, the government seized control of Saratoga's entire business and physically occupied its property. This Court has already declared that this kind of intrusion is not a mere regulatory burden of the sort that can constitutionally be imposed upon a business. A property owner's ability to conduct his business "may not be conditioned on his forfeiting the right to compensation for a physical occupation." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 439 n.17.

4. The decision below sharply diverges from the principles established in this Court's takings decisions. Moreover, the rationale on which it rests—namely, an alleged diminished property rights expectation for heavily regulated industries—has been sharply criticized by another court of appeals. *See Colorado Springs Production Credit Ass'n v. Farm Credit Administration*, slip op. at 14 n.8. Because the Federal Circuit is the exclusive appellate forum for takings cases brought under the Tucker Act, the erroneous doctrine promulgated in the decision below will have broad impact.

The issue presented here is likely to recur with increasing frequency. Recent legislation, effective Dec. 19, 1992, will *require* federal banking agencies to appoint a conservator or receiver once an institution's capital has fallen below designated levels, without regard to whether the institution is solvent and valuable. Comprehensive Deposit Insurance Reform and Taxpayer Protection Act of 1991, Pub. L. No. 102-242, § 131(a), 105 Stat. 2261 (Dec. 19, 1991). In addition, federal regulators have announced that they intend to supervise federally-insured banks by "err[ing] on the side of closing institutions rather than allowing them to linger in the private sector." Daily Exec. Rep. (BNA) at A17 (June 4, 1992) (statement of T. Ryan, Director of OTS). Prompt resolution of the question whether such government seizures trigger a just compensation obligation therefore will enhance

the ability of both businesses and government agencies to plan their decisions more rationally.

The concern to secure the nation's banking system is unquestionably legitimate. But in pursuing that worthy goal the government is not free to disregard the constitutional guarantee of just compensation. Moreover, the principles espoused by the court of appeals are not limited to the banking industry, but cast a shadow over the Fifth Amendment protection of any business whose takeover by the government might serve a legitimate public purpose. For example, the railroad industry is heavily regulated, but surely Congress cannot enact legislation enabling the government to take over a valuable private railroad in the public interest without incurring an obligation to pay just compensation. *See generally Regional Rail Reorganization Cases*, 419 U.S. 102 (1974).

In sum, if allowed to stand, the decision below will create considerable mischief in an area of takings jurisprudence to which this Court has only recently brought order. Review by this Court is warranted to prevent these undesirable consequences.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LEONARD BICKWIT, JR.
Counsel of Record
ALAN I. HOROWITZ
SUSAN GINSBURG
MILLER & CHEVALIER, Chartered
Metropolitan Square
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 626-5800
Counsel for Petitioner

JULY 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

91-5092

CALIFORNIA HOUSING SECURITIES, INC.,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee.

DECIDED: March 24, 1992

Before RICH, NEWMAN and CLEVENGER, *Circuit Judges*.

CLEVENGER, *Circuit Judge*.

California Housing Securities, Inc. (CHS) appeals from an order of the United States Claims Court, No. 90-467C (April 2, 1991), granting summary judgment to the United States. The Claims Court held that the appointment and subsequent actions of the Resolution Trust Corporation (RTC) as conservator and receiver of Saratoga Savings and Loan Association (Saratoga) were not a compensable taking under the fifth amendment to the United States Constitution. We affirm

I

CHS became the sole owner of Saratoga, a federally-insured savings and loan association, one year after Saratoga became a California-chartered savings and loan

association in 1983. California requires its state-chartered savings associations to participate in the federal deposit insurance program. Cal. Fin. Code § 5606(a) (West 1991).

In 1983, the federally-insured savings and loan industry was governed by three major statutes enacted in the 1930's: the Federal Home Loan Bank Act, Pub. L. No. 72-304, 47 Stat. 725 (1932) (codified as amended at 12 U.S.C. §§ 1421-1449 (1988)), the Home Owners' Loan Act of 1933, Pub. L. 73-43, 48 Stat. 128 (1933) (codified as amended at 12 U.S.C. §§ 1461-1470 (1988)), and the National Housing Act, Pub. L. No. 73-479, 48 Stat. 1246 (1934) (codified as amended at 12 U.S.C. §§ 1701-1749 (1988)). Saratoga applied for and received federal deposit insurance from the Federal Savings and Loan Insurance Corporation (FSLIC) which operated under the direction of the Federal Home Loan Bank Board. 12 U.S.C. §§ 1725(a), 1726(a)(2) (1988) (repealed by Pub. L. No. 101-73, 103 Stat. 363 (1989)).

As one of many operating conditions required by federally-insured associations, Saratoga pledged that it would "not carry on any sales plan or practices, or any advertising, in violation of regulations to be made by [FSLIC]." 12 U.S.C. § 1726(b) (1988) (repealed 1989). At that time, Saratoga understood that the Federal Home Loan Bank Board could appoint FSLIC as conservator or receiver of a federally-insured savings and loan association, 12 U.S.C. § 1729(c) (1988) (repealed 1989), when certain criteria were met, including:

> substantial dissipation of assets or earnings due to any violation or violations of law, rules or regulations, or to any unsafe or unsound practice or practices[.]

12 U.S.C. § 1464(d)(6)(A)(ii) (1988) (amended by Pub. L. No. 101-73, 103 Stat. 2282 (1989)). FSLIC had "the authority to liquidate such institution in an orderly

manner or to make such other disposition of the matter as it deem[ed] to be in the best interests of the institution, its savers, and [FSLIC]." 12 U.S.C. § 1729(c)(3)(B) (1988) (repealed 1989).

In 1989, the structure of agency responsibility for governing federally-insured savings and loan associations was revised. Congress, acting in response to the crisis in the savings and loan industry, enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (1989). FIRREA abolished the Federal Home Loan Bank Board. Pub. L. No. 101-73, § 401(a)(2) (1989) (codified at 12 U.S.C. § 1473 note (Supp. II 1990)). At the same time, FIRREA provided federal insurance for associations like Saratoga through the Savings Association Insurance Fund. 12 U.S.C. §§ 1813(c)(2), 1814(a)(2) (Supp. II 1990). FIRREA created the Office of Thrift Supervision (OTS) in the Department of the Treasury, and made it responsible for the examination, supervision, and regulation of all federally insured savings associations. 12 U.S.C. §§ 1462a, 1463 (Supp. II 1990). FIRREA also created the RTC and charged it with resolving the cases of savings and loan associations closed between January 1989 and August 1992, taking over FSLIC's role as conservator or receiver. 12 U.S.C. § 1441a(b) (Supp. II 1990).

FIRREA authorizes the director of OTS, in place of the now defunct Federal Home Loan Bank Board, to appoint the RTC as conservator or receiver of a federally-insured state savings association (such as Saratoga) if one or more statutory ground exists, including:

> substantial dissipation of assets or earnings due to any violation or violations of law or regulations, or to any unsafe or unsound practice or practices[.]

12 U.S.C. § 1464(d)(2)(C)(ii) (Supp. II 1990). The RTC has authority to resolve an association's problems

by merging it with another insured depository association or transferring any asset or liability of the association. 12 U.S.C. §§ 1441a(b)(4), 1821(d)(2)(G) (Supp. II 1990). After the RTC pays all claims and administrative expenses, the remaining funds are transferred to the depository association's shareholders. In this case such a transfer would be to CHS as sole shareholder. 12 U.S.C. § 1821(d)(11)(B) (Supp. II 1990).

On November 8, 1989 OTS appointed the RTC conservator for Saratoga. Saratoga challenged the validity of the RTC's appointment as conservator in the U.S. District Court for the District of Columbia pursuant to 12 U.S.C. § 1464(d)(2)(E), (G) (Supp. II 1990). *Saratoga Savings and Loan Ass'n v. Ryan*, Civ. Action No. 89-3305. The district court has not yet issued a judgment in that case. On November 9, 1989 the RTC entered and took possession of Saratoga's offices in California. On May 24, 1990 OTS appointed the RTC as receiver of Saratoga. The RTC liquidated most of Saratoga's assets and liabilities on June 1, 1990.

II

CHS filed a complaint in the Claims Court on May 30, 1990 alleging that OTS and the RTC had taken Saratoga's property in violation of the fifth amendment of the United States Constitution which commands that "private property [shall not] be taken for public use, without just compensation." The Claims Court determined that the appointment of the RTC as conservator, and then receiver, of Saratoga and the RTC's subsequent transfer of Saratoga's assets to a new association did not constitute a fifth amendment taking. *California Hous. Sec., Inc. v. United States*, No. 90-467C, Order of Judge Andewelt (Cl. Ct. Apr. 2, 1991). The Claims Court's judgment relied on the reasoning articulated in *American Continental Corp. v. United States*, 22 Cl. Ct. 692 (1991), which concerned the government's seizure and liquidation

of Lincoln Savings and Loan Association. In *American Continental*, the Claims Court determined that the government's actions did not constitute a compensable regulatory taking because these actions promoted the public interest in a sound banking system and because they did not interfere with the investment-backed expectations of the savings and loan association or of its corporate parent, American Continental. The court also rejected American Continental's attempt to characterize the government's actions as a taking of property by permanent physical occupation, under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), because the association and its parent lacked any historically rooted expectation of compensation for the regulatory action taken. "To the contrary, plaintiffs' expectations could only be that regulators would exert physical control over Lincoln's assets if the Board made a finding that Lincoln was in 'an unsafe or unsound condition to transact business.'" *American Continental*, 22 Cl. Ct. at 700.

III

The sole contention of CHS on appeal is that the actions of OTS, in appointing the RTC as conservator and receiver of Saratoga, and the RTC's subsequent actions as conservator and receiver of Saratoga resulted in a permanent occupation and physical taking of Saratoga's property in violation of the fifth amendment's taking clause.[1] CHS's legal theory thus relies on *Loretto*.[2] In

[1] Because CHS does not make a "regulatory" taking claim, we have no occasion to consider whether a "physical occupation" taking claim can be established on the same facts which would disprove a "regulatory" taking.

[2] The government argues that CHS lacks standing to sue individually or derivatively on behalf of Saratoga. The government also states, however, that this court would have jurisdiction over CHS's complaint if it could be construed as filed by a sole shareholder on behalf of a corporation alleging that compensation to the corporation will result in a surplus in which the shareholder possesses a

that case, the Supreme Court held that a New York statute requiring a landlord to permit installation of cable television facilities on her property at a government-fixed rate was a fifth amendment taking because it constituted a permanent physical occupation of her property. *Loretto*, 458 U.S. at 438-41. In particular, the Supreme Court stated that "a permanent physical occupation authorized by [the] government is a taking without regard to the public interests that it may serve." *Id.* at 426. Consequently, "a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." *Id.* at 432. In sum, "when the 'character of the governmental action,' [*Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)], is a permanent physical occupation of property, [the Supreme Court's] cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.* at 434-35.

CHS urges us to follow the language of *Loretto* simply because the government entered and took possession of Saratoga's property when acting as conservator and receiver of that association. CHS, however, does not come to grips with the distinction between the property rights Saratoga possessed at the time of its occupation and seizure and those with whom the state interfered in *Loretto*. The ground for that distinction is unmistakably identified in *Loretto*:

> Our holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking. In such a case, the

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direct interest pursuant to 12 U.S.C. § 1821(d)(11)(B) (Supp. II 1990). We read CHS's complaint to claim such a surplus and therefore reject the government's challenge of CHS's individual standing to sue. We thus need not decide whether the Claims Court is authorized to entertain a shareholder derivative suit or whether other grounds exist for suit by CHS individually.

> property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation. We do not, however, question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's *use* of his property.

458 U.S. at 441 (emphasis in original).

The RTC's occupation and seizure of Saratoga, and its subsequent liquidation of Saratoga's assets, cannot constitute a physical fifth amendment taking because neither Saratoga nor CHS could have developed a historically rooted expectation of compensation for such a seizure. Saratoga did not possess the most valued property right in the bundle of property rights, the right to exclusive possession, or stated conversely the right to exclude others, at the time of the alleged taking in this case. The power to exclude is an essential element of property ownership. It "has traditionally been considered one of the most treasured strands in an onwer's bundle of property rights." *Loretto*, 458 U.S. at 435-36 (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979), and Restatement of Property § 7 (1936)). *See also Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987), quoting *Loretto*, 458 U.S. at 433, quoting *Kaiser Aetna*, 444 U.S. at 176 ("We have repeatedly held that, as to property reserved by its owner for private use, 'the right to exclude [others is] 'one the most essential sticks in the bundle of rights that are commonly characterized as property.'"); *Kaiser Aetna*, 444 U.S. at 179-80 ("In this case, we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation."); *Hendler v. United States*, 952 F.2d 1364, 1377 (Fed. Cir. 1991). Saratoga lacked the fundamental right to exclude

the government from its property at those times when the government could legally impose a conservatorship or receivership on Saratoga. As a consquence of the regulated environment in which Saratoga voluntarily operated, Saratoga and CHS held less than the full bundle of property rights on which a *Loretto* expectation of compensation is founded.

That Saratoga voluntarily subjected itself to an expansive statutory regulatory system when it obtained federal deposit insurance cannot be questioned. It is well known that "[b]anking is one of the longest regulated and most closely supervised of public callings." *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947). While it is true that California requires all state-chartered savings and loans to be federally insured, Saratoga's decision to enter the savings and loan business in California was voluntary. Upon so deciding, Saratoga understood, with what may only be viewed as a historically rooted expectation, that the federal government would take possession of its premises and holdings as conservator or receiver if it substantially dissipated its "assets or earnings due to any violation or violations of law or regulations, or to any unsafe or unsound practice or practices[.]" 12 U.S.C. § 1464(d)(6)(A)(ii) (1988) (amended 1989). Saratoga also understood that such an occupation and seizure would not leave Saratoga without rights. Saratoga could have reasonably expected to be able to contest the appointment of the conservator and the receiver in a U.S. district court. 12 U.S.C. § 1464(d)(6)(A)(v) (1988) (amended 1989). What neither Saratoga nor CHS could have expected was to be compensated for a regulatory possession by OTS and the RTC of its property if that possession were to occur following a determination that Saratoga's financial situation mandated federal conservatorship or receivership.

The changes that occurred in the laws governing federally-insured savings and loan associations between the

time Saratoga began operating in 1983 and the time the RTC entered its premises in 1989 also could not have engendered any expectation of compensation for the regulatory actions taken by the government. Conservatorship and receivership under FIRREA differ from conservatorship and receivership under the predecessor statutes more procedurally than substantively. *Compare* 12 U.S.C. § 1464(d)(6)(A) (1988) (repealed 1989) *with* 12 U.S.C. § 1464(d)(2)(C) (Supp. II 1990) (circumstances when conservator and receiver may be appointed substantially similar); 12 U.S.C. § 1729(c)(1)(B)(i)(I) (1988) (repealed 1989) (Federal Home Loan Bank Board may appoint FSLIC conservator or receiver) *with* 12 U.S.C. §§ 1441a(b), 1462a (Supp. II 1990) (OTS may appoint RTC conservator or receiver); 12 U.S.C. § 1729(c)(3)(B) (1988) (repealed 1989) (FSLIC has authority to liquidate institutions or make any other disposition) *with* 12 U.S.C. §§ 1821(d)(2)(G), 1441a(b)(4) (Supp. II 1990) (RTC has authority to merge the institution or transfer any asset or liability). Moreover, the laws governing savings and loan associations have not been static; each of the three statutes involved has been repeatedly amended by Congress since its enactment more than fifty years ago. Given this long history of government regulation of savings and loan associations, CHS and Saratoga were certainly on notice that Saratoga might be subjected to different regulatory burdens over time. *See Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986) (quoting *Federal Hous. Admin. v. Darlington, Inc.*, 358 U.S. 84, 91 (1958)) ("Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."); *Atlas Corp. v. United States*, 895 F.2d 745, 758 (Fed. Cir.), *cert. denied*, 111 S. Ct. 46 (1990).

In exchange for the benefit of federal deposit insurance, Saratoga gave the government the right, among other rights, to place Saratoga in conservatorship or receivership when warranted. The conservatorship and receiver-

ship actions of OTS and the RTC arose out of this voluntary agreement from which Saratoga benefited for six years. The government's actions cannot now be deemed a taking. *Cf. Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984) ("[A]s long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking.").

Finally, the holding of a constitutionally compensable taking in *United States v. Pewee Coal Co., Inc.*, 341 U.S. 114 (1951) does not receive CHS's claim for compensation. In *Pewee Coal*, the President issued an Executive Order mandating that the federal government immediately take over operation of coal mines in which a strike or stoppage had occurred or was threatened. *Id.* at 116. The regulatory scheme that permitted federal occupation of Pewee's coal mine appeared suddenly, at a point in time after Pewee had decided to produce coal. Pewee could fairly expect that it would possess the coal mine undisturbed and that it would be compensated in the event the government took control of the property. Saratoga, unlike Pewee, foresaw the government's occupation of its premises under the circumstances present here when it began operation. Pewee rightly enjoyed a historically rooted expectation of compensation. Saratoga did not.

In short, *Loretto* simply does not fit cases such as this where the historically rooted expectations of ownership that underlie *Loretto* do not exist. Judge Andewelt stated this point well in his *American Continental* opinion disposing of the same *Loretto* taking argument:

> The *Loretto per se* approach should not facilely be extended in cases where the historically rooted expectations that underlie the *Loretto* decision do not remotely apply. The instant case involves a regula-

> tory action in a highly regulated industry in which the government took actions that reasonably should have been expected by plaintiffs and Lincoln.

American Continental, 22 Cl. Ct. at 701. The government's occupation and seizure of Saratoga did not constitute a compensable physical taking under the fifth amendment. The judgment of the Claims Court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES CLAIMS COURT

No. 90-467C

CALIFORNIA HOUSING SECURITIES, INC.,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

(Filed: April 2, 1991)

ORDER

This is a fifth amendment takings case. The property alleged to have been taken is Saratoga Savings and Loan Association (Saratoga), a California-chartered, federally insured institution. The allegation of a taking focuses on the government's appointment of a conservator, and then a receiver, to manage Saratoga's affairs, and the receiver's subsequent transfer of Saratoga's assets to a new institution. Plaintiff, California Housing Securities, Inc., owns *all* of the common stock of Saratoga, which it acquired in 1984.

In *American Continental Corp. v. United States*, No. 344-89C, slip op. (Mar. 22, 1991), this court addressed essentially the same fifth amendment issues raised in the instant action. Therein, the court concluded that the government's appointment of a conservator, and then a receiver, for Lincoln Savings and Loan Association (Lincoln), and the receiver's transfer of Lincoln's assets to a new institution, did not constitute a fifth amendment takings. The parties agree that the reasoning of this court in *American Continental* would warrant the same conclu-

sion as to the instant allegation of a fifth amendment takings.

There are two factual differences between *American Continental* and the instant action which warrant brief mention. First, the respective appointments of a conservator and receiver in the two actions were made under different statutory authority. The appointments in *American Continental* were made pursuant to 12 U.S.C. § 1729, which was repealed in 1989 as part of the Financial Institution Reform Recovery and Enforcement Act of 1989 (the Reform Act), Pub. L. No. 101-73, 103 Stat. 355 (1989). The appointments in the instant action were made pursuant to 12 U.S.C. § 1821 (1989), which was part of the Reform Act. But the two statutes, in pertinent part, do not differ materially and the court's general analysis in *American Continental* would apply.

Second, in *American Continental*, the district court issued a decision upholding the government's appointment of a conservator and then a receiver and in the course of that decision found, *inter alia*, that plaintiff American Continental Corporation had looted Lincoln. In the instant case, plaintiff brought a district court action but the district court apparently never issued a decision on the merits of plaintiff's challenge. Hence, herein there are no analogous district court findings upholding the government's appointments or indicating any wrongdoing by plaintiff. But this court explained in *American Continental* that its decision was not dependent on the district court's findings.

Accordingly, summary judgment is granted in defendant's favor and plaintiff's motion for partial summary judgment is denied. The Clerk of the Court is directed to dismiss plaintiff's complaint. No costs.

IT IS SO ORDERED.

/s/ Roger B. Andewelt
ROGER B. ANDEWELT
Judge

APPENDIX C

IN THE UNITED STATES CLAIMS COURT

No. 344-89C

(Filed: March 22, 1991)

AMERICAN CONTINENTAL CORP., *et al.*,
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

OPINION

ANDEWELT, Judge.

This is a fifth amendment takings case. The property alleged to have been taken is Lincoln Savings and Loan Association (Lincoln), a California-chartered, federally insured institution. The allegation of a taking focuses on the government's appointment of a conservator, and then a receiver, to manage Lincoln's affairs, and the receiver's transfer of Lincoln's assets to a new institution. Plaintiffs, American Continental Corporation (ACC) and First Lincoln Financial Corporation (First Lincoln), owned, either directly or indirectly, all of the common stock of Lincoln.[1] This case is presently before the court on plaintiffs' motion for partial summary judgment and defendant's motion to dismiss or, in the alternative, cross-motion for summary judgment. For the reasons set forth

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[1] Prior to August 14, 1989, ACC was the parent and sole shareholder of First Lincoln, which in turn was the parent and sole owner of all outstanding common stock of Lincoln. On August 14, 1989, First Lincoln was merged with ACC.

below, no fifth amendment taking has occurred and defendant's cross-motion for summary judgment is granted.

I.

In an April 14, 1989, resolution, the Federal Home Loan Bank Board (the Board) appointed a conservator for Lincoln on the grounds that Lincoln was "in an unsafe and unsound condition to transact business" and that there had been a "substantial dissipation of [Lincoln's] assets and earnings due to violations of law, rules and regulations and to unsafe and unsound practices." (Board Resolution No. 89-1328 at 2 (Apr. 14, 1989).) Hours after the appointment, the conservator took over management of Lincoln and a representative of the conservator took possession of Lincoln's books, records, property, and assets.

Thereafter, Lincoln, ACC, and First Lincoln challenged the Board's appointment of a conservator in consolidated district court actions. Prior to a decision by the district court, the Board appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver for Lincoln. (Board Resolution No. 89-2163 (Aug. 2, 1989).) The FSLIC promptly transferred Lincoln's assets to a new institution, Lincoln Savings and Loan Association, F.A. (New Lincoln). The Board appointed the FSLIC as conservator of New Lincoln and the Federal Deposit Insurance Corporation (FDIC) as managing agent. On August 9, 1989, by operation of the Financial Institution Reform Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 355 (1989), the Resolution Trust Corporation (RTC) succeeded to the interests and power of the FSLIC and the FDIC in their respective capacities as conservator and managing agent of New Lincoln.

On August 22, 1990, the district court entered an order dismissing the plaintiffs' challenge to the appointment

of a conservator and then a receiver.[2] In any accompanying decision, the district court concluded that the Board had acted properly in placing Lincoln first in conservatorship and then in receivership. *Lincoln Savings & Loan Ass'n, et al. v. Wall*, 743 F. Supp. 901 (D.D.C. 1990). In the course of its decision, the district court strongly criticized Lincoln's operations and ACC's conduct in dealing with Lincoln. *Inter alia*, the court analyzed a variety of banking transactions between Lincoln and ACC and characterized their actions as "dishonest" and "abusive." *Id.* The court concluded that (1) Lincoln and ACC had engaged in numerous unsafe and unsound banking practices, (2) Lincoln was in an unsafe and unsound condition to transact business, and (3) ACC officials had abused their positions as owners of Lincoln and engaged in actions that "amounted to a looting of Lincoln." *Id.* at 906, 919.

Plaintiffs filed the instant takings action on June 20, 1989, prior to the district court decision. In their complaint, plaintiffs allege that the Board's takeover of Lincoln constitutes a taking of property for which compensation is due under the fifth amendment. Plaintiffs clarified their takings claim in the course of briefing the instant motions and again during oral argument. In effect, plaintiffs are making two distinct takings claims. The first involves the alleged taking of property from Lincoln. Plaintiffs contend that the government took Lincoln's assets, books, and records and the rights of Lincoln's management to control Lincoln's actions. Plaintiffs contend that because the receiver, appointed by the government, will not pursue such a claim, plaintiffs, as sole owners of Lincoln common stock, are entitled to pursue the claim through a shareholder derivative action.

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[2] Lincoln, ACC, and First Lincoln amended their compiaints in the district court action to add a challenge to the appointment of a receiver.

Plaintiffs' second claim involves an alleged taking of property directly from plaintiffs. Plaintiffs contend that as owners of Lincoln's common stock, they were entitled to control Lincoln, this "right to control" constituted property protectable under the fifth amendment, and the government took this property when it appointed a conservator and then a receiver for Lincoln. Defendant contends that neither of these claims is properly before the court. In any event, however, assuming the two claims are properly before the court,[3] neither is meritorious and, thus, defendant's motion for summary judgment must be granted.

II.

"The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Assuming the correctness of the district court's findings concerning Lincoln's financial condition, ACC and Lincoln's business practices, and ACC's looting

[3] Defendant takes the position that this court lacks jurisdiction over plaintiffs' first claim because the Tucker Act, 28 U.S.C. § 1491, does not authorize this court to entertain a shareholder derivative suit. As to the second claim, defendant contends that a shareholder's "right to control" does not constitute property within the meaning of the fifth amendment and, therefore, plaintiffs fail to state a claim within the jurisdiction of this court. The parties' contentions as to these defenses evolved considerably during oral argument, and the focus of the arguments shifted to theories and case law that had not been developed or cited in the course of briefing defendant's motion to dismiss. Because these theories involve issues of first impression, this court is hesitant to resolve them without additional briefing. However, since this court is firm in its conclusion that no compensable taking has occurred, the court will resolve this action on summary judgment and will refrain from putting the parties to the expense of an additional series of briefs on defendant's motion to dismiss.

of Lincoln, the arrow of fairness and justice could not possibly point in plaintiffs' direction. Rather than suggesting that the general public should assume fiscal responsibility, fairness and justice would require that any damage resulting from the government's takeover of Lincoln be borne by plaintiffs.

Plaintiffs acknowledge that the doctrine of collateral estoppel precludes them from disputing the district court's findings that Lincoln had engaged in numerous unsafe and unsound business practices and that Lincoln was in an unsafe and unsound condition to transact business. Plaintiffs contend, however, that they are not bound by the district court findings that relate to any wrongdoing by ACC because these findings were not necessary and essential to the district court's decision. *Mother's Restaurant, Inc. v. Mama's Pizza, Inc.*, 723 F.2d 1566, 1569 (Fed. Cir. 1983). But the mere fact that plaintiffs First Lincoln and ACC controlled Lincoln during the time Lincoln's financial condition deteriorated and Lincoln engaged in such improper practices would appear itself to be sufficient to direct the equities against plaintiffs. In any event, however, evaluation of the merits of plaintiffs' takings claims is not dependent upon this court applying the doctrine of collateral estoppel so as to preclude plaintiffs from disputing any of the district court's findings of fact. For the reasons set forth below, the regulatory structure under which Lincoln operated was such that, even if there was no district court decision, the government's actions in assuming control of Lincoln's operations could not be found to constitute a fifth amendment taking.

III.

The courts have not developed a "set formula" that in all cases will distinguish between public action that constitutes a compensable taking and public action that falls outside the protection of the fifth amendment's takings clause. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005

(1984), citing *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). The inquiry into whether governmental action has gone beyond mere "regulation" and constitutes a taking is essentially an "ad hoc, factual inquiry." 467 U.S. at 1005. Among the key factors typically considered in this inquiry are "[(1)] the character of the governmental action, [(2)] its economic impact, and [(3)] its interference with reasonable investment-backed expectations." *Id.* Herein, such an inquiry requires an understanding of the regulatory context in which the governmental action was taken.

There are significant benefits that stem from a savings and loan association operating as a federally insured institution, not the least of which is the association's ability to attract depositors based on the federal government's guarantee of deposits up to $100,000. 12 U.S.C. § 1728 (1989). But such benefits do not come without attendant costs. Federally insured banking is a highly regulated industry. In its effort to promote the strong public interest in a sound banking system, the federal government regulates many aspects of the business of federally insured savings and loan associations. *See, e.g., Fahey v. Mallonee*, 332 U.S. 245, 250 (1947) ("Banking is one of the longest regulated and most closely supervised of public callings."); *First Nat'l Bank of Scotia v. United States*, 530 F. Supp. 162, 166 (D.D.C. 1982) ("[Federal agencies] are charged with the task of overseeing [federally insured institutions] for the protection of the public and the national economy as a whole, and not for the benefit or protection of individual banking institutions.").

One small part of the extensive regulatory framework involves the potential appointment of a conservator or receiver. Pursuant to 12 U.S.C. § 1729, which was in effect at the time the Board appointed a conservator and receiver of a state-chartered, federally insured savings and loan association, such as Lincoln, if the Board determined that "any of the grounds specified in [12 U.S.C.

§ 1464(d)] existed." One such specified ground was that the bank was in "an unsafe or unsound condition to transact business." Section 1464(d)(6)(A)(iii) (1989). Once appointed, the conservator or receiver of a state-chartered savings and loan association had the same broad powers and duties with respect to the insured institution as those powers and duties described in Section 1729(b)(1)(A) for a conservator or receiver of a federal bank. 12 U.S.C. § 1729(c)(1)(B)(i)(II). Those powers included the authority:

> (i) to take over the assets of and operate such association;
>
> (ii) to take such action as may be necessary to put it in a sound solvent condition;
>
> (iii) to merge it with another insured institution;
>
> (iv) to organize a new Federal association to take over its assets;
>
> (v) to proceed to liquidate its assets in an orderly manner; or
>
> (vi) to make such other disposition of the matter as it deems appropriate;
>
> whichever it deems to be in the best interest of the association, its savers, and the Corporation . . . .

12 U.S.C. § 1729(b)(1). The regulatory scheme permitted a challenge in district court[4] to a Board decision to appoint a conservator or receiver.[5]

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[4] Section 1464(d)(1) authorized federal savings and loan associations to file suit in district court to challenge the Board's appointment of a conservator or receiver. Pursuant to Section 1729(c)(3)(A), the provisions of Section 1464(d)(1) applied to state-chartered, federally insured associations, such as Lincoln.

[5] On August 9, 1989, 12 U.S.C. § 1729 was repealed, but the powers of conservator and receiver and the rights of the insured institution and its shareholders remained, in pertinent part, the same. *See, e.g.*, 12 U.S.C. § 1821(d).

IV.

The regulatory scheme described above, which was in effect when plaintiffs made their investment in Lincoln in 1984, is the crucial focus for the ad hoc factual inquiry into whether the governmental action constitutes a fifth amendment taking.

First, give the regulatory setting, the proper characterization of the "character of the governmental action" is that the federal government was enforcing portions of an extensive regulatory scheme designed to promote the public interets in a sound banking system. As summarized above, Section 1729 authorized the Board to appoint a conservator or receiver when it found that Lincoln was in "an unsafe or unsound condition to transact business." The Board first appointed a conservator and then a receiver and the receiver in turn transferred Lincoln's assets to a new corporation—an act unambiguously within the scope of the receiver's authority as described in Section 1729(c)(1)(B)(i)(II). This characterization of the governmental action as involving such an effort to promote the public interest militates against finding a fifth amendment taking. Court's have been hesitant to find a fifth amendment taking where, as here, the government's alleged interference with property "arises from a public program that adjusts the benefits and burdens of economic life to promote the common good." *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986).

This regulatory scheme is also the key to characterizing another relevant factor under *Ruckelshaus v. Monsanto*—the property owner's reasonable investment-backed expectations. In evaluating this factor, plaintiffs contend that it is necessary to distinguish between their two takings claims. The second claim, involving the alleged taking of plaintiffs' "right to control" Lincoln, can be resolved most directly. Plaintiffs did not make their investment in Lincoln until 1984. At that time, the pertinent regulatory provisions permitting the government to appoint a

conservator or receiver were in effect. Therefore, to be reasonable, any expectations plaintiffs had at that time must have been made with recognition of the government's authority to make such an appointment. Because of the highly regulated nature of federally insured banking and because the government did no more than exercise its authority under statutes that pre-existed plaintiffs' investment, the government's assuming control of Lincoln could not possibly have interfered with plaintiffs' reasonable investment-backed expectations. Certainly plaintiffs could not reasonably have expected that the government, in its dealings with Lincoln, would fail to enforce the applicable statutes and regulations.

Plaintiffs' first takings claim, which involves the alleged taking of property from Lincoln, arguably requires a somewhat different analysis. Since a shareholder derivative action is brought by shareholders on behalf of a corporation, *see, e.g.*, 13 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 5939 at 97 (1984), plaintiffs argue that the appropriate focus here is the investment-backed expectations of Lincoln (the corporation) rather than plaintiffs (the shareholders). Lincoln first became a federally insured bank in 1934. At that time, while federally insured savings and loan associations were subject to federal regulation, there was no regulatory provision specifically authorizing the government to appoint a conservator or receiver. Congress first authorized appointment of a receiver in 1968, Bank Protection Act of 1968, Pub. L. No. 90-389, § 6, 82 Stat. 294 (1968), and the statutory authority to appoint a conservator was not enacted until 1982. *See* Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 122(d), 96 Stat. 1469, 1482 (1982).

But even assuming that the proper focus is Lincoln's investment-backed expectations rather than plaintiffs', the fact that the regulatory scheme changed somewhat after 1934 does not mean that the government's actions

herein interfered with Lincoln's reasonable investment-backed expectations. To the contrary, when an investment is made in such a highly regulated industry, to be reasonable, expectations must be based not only on then-existing federal regulations but also on the recognition that there may well be related changes in the regulations in the future. *See, e.g., Atlas Corp. v. United States*, 895 F.2d 745, 758 (Fed. Cir. 1990), *cert. denied*, 111 S. Ct. 46 (1990). "Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Connolly*, 475 U.S. at 227, quoting *FHA v. Darlington, Inc.*, 385 U.S. 84, 91 (1958).

Here, there were numerous post-1934 changes enacted to buttress the earlier regulatory scheme designed to promote a sound banking system. Some of the changes clearly benefitted plaintiffs' investment. For example, the amount of deposits per account that was federally insured increased over time from $5,000 in 1934, National Housing Act, Pub. L. No. 479, § 405, 48 Stat. 1246, 1259 (1934), up to $100,000 in 1980, Consumer Checking Account Equity Act of 1980, Pub. L. No. 96-221, § 308, 94 Stat. 145, 147 (1980). In the face of all of the regulatory changes, Lincoln voluntarily chose to continue to operate as a federally insured bank and continued to make new investments in its operations.[6]

Moreover, there would be no unexpected interference with reasonable investment-backed expectations even if the court ignored all other regulatory changes and focused exclusively on the change permitting appointment of a conservatory or receiver and if the court further ignored

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[6] Plaintiffs contend that Lincoln's actions should not be viewed as voluntary because California state law conditioned Lincoln's right to operate as a savings and loan association in California on Lincoln being federally insured. But the federal government can hardly be held financially liable for the regulatory decisions of the State of California.

all subsequent Lincoln investments and focused only on investments made prior to the regulatory change permitting appointment of a conservator or receiver. As the current savings and loan crisis poignantly demonstrates, federal deposit insurance predictably leaves the government vulnerable to enormous potential liability in the case of an association's failure. In view of this potential liability, it was hardly contrary to reasonable expectations of an investor in the highly regulated, federally insured banking industry when the federal government buttressed the then-existing regulatory scheme by authorizing appointment of a conservator or receiver when a federally insured bank is in an "unsafe or unsound condition to transact business." Moreover, this change did not sanction arbitrary action by the regulatory agencies. All such appointments were subject to district court review. In addition, the conservator, and then the receiver, was obliged to operate Lincoln for the benefit of Lincoln, its depositors, and the Board, 12 U.S.C. § 1729(b)(1), and was obliged ultimately to turn all remaining proceeds over to Lincoln's shareholders after making payments to depositors, creditors, and other claimants and after paying expenses, 12 U.S.C. § 1821(d). In this context, the government's appointment of a conservator and then a receiver pursuant to the 1982 statutory scheme cannot be said to have interfered with Lincoln's reasonable investment-backed expectations.

There is a dispute as to the remaining factor discussed in *Ruckelshaus v. Monsanto*—the economic effect of the governmental action. In their complaint, plaintiffs contend that "the Board's takeover of Lincoln and the resulting actions and inactions of the Board and the conservator have reduced the fair market value of Lincoln's assets." In response, defendant contends that, if anything, the Board's actions improved Lincoln's economic position, *inter alia*, because the conservator stopped the looting of Lincoln by ACC. But, in any event, this dispute as to the economic effect need not be resolved to

decide the takings issue. In view of this court's conclusions above as to the character of the governmental action and the absence of any interference with investment-backed expectations, fairness and justice require a decision that no taking has occurred, regardless of the alleged economic effect.

As explained above, plaintiffs and Lincoln voluntarily invested in a highly regulated industry and voluntarily chose to continue to operate in that industry in the face of numerous regulatory changes. The governmental action in dispute involves the government's enforcing an established regulatory scheme designed to promote the public interest in a sound banking system. That scheme did not, in any significant way, interfere with any reasonable investment-backed expectations. In pertinent part, it (1) permitted appointment of a conservator or receiver only upon a finding that Lincoln was in an "unsafe and unsound condition," (2) authorized district court review of any such appointment, and (3) obliged the conservator or receiver to pay all remaining proceeds to Lincoln's shareholders.

In this context, plaintiffs and Lincoln, as investors, were on reasonable notice as to what the "rules of the game" were, or reasonably could be, in the highly regulated banking industry. Plaintiffs' fifth amendment takings action, in effect, represents an effort to change those rules after the fact. But it would be no more fair and just to change the rules and require the public to pay damages here when plaintiffs allegedly lost money than it would be to change the rules and require plaintiffs to make unexpected extra payments to the public had plaintiffs' investment turned out to be highly successful.

One other point is worth noting on the issue of economic harm. The alleged economic harm upon which plaintiffs rely did not result directly from the governmental act that plaintiffs classify as a taking. As explained in detail below, the taking plaintiffs allege is the

government's permanent physical-occupation of Lincoln. That purported taking occurred on or about April 14, 1989, when the conservator asserted physical control over Lincoln and its assets. But that assertion of control over Lincoln's assets involved, in essence, merely a change in management. As noted above, the conservator, and then the receiver, was obliged to operate Lincoln for the benefit, *inter alia*, of Lincoln, and ultimately was obliged to turn over any remaining monies to Lincoln's shareholders. Thus, to the extent the government's takeover of Lincoln had any significant economic effect, that effect was not the direct result of the physical occupation of Lincoln (*i.e.*, the alleged taking) but rather the result of the "actions and inactions" that the conservator and receiver took after the takeover had occurred. Rather than raising issues under the fifth amendment, claims of mismanagement would appear to sound in tort and, therefore, would fall outside this court's Tucker Act jurisdiction. *See* 28 U.S.C. § 1491(a).

V.

Plaintiffs' argument that the government's exercise of its regulatory authority constituted a taking is based primarily on the Supreme Court's analysis of the scope of the fifth amendment's takings clause in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). *Loretto* involved a New York state statute that obliged the owners of residential, multifamily buildings to permit cable television (CATV) companies to attach CATV equipment on the buildings so as to permit tenants to receive CATV service. In concluding that the state statute constituted a fifth amendment taking, the Supreme Court rejected the multifactor analysis, summarized above, that is typically employed in takings cases. The Court instead adopted a *per se* approach. The Court stated:

> [W]e have long considered a physical intrusion by government to be a property restriction of an un-

> usually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, "the character of the government action" not only is an important factor in resolving whether the action works a taking but also is determinative.

Loretto, 458 U.S. at 426. Herein, because representatives of the conservator took physical possession of Lincoln's books, records, property, and assets,[7] plaintiffs contend that the proper characterization of the governmental action is "a permanent physical occupation" of plaintiffs' property and, hence, that the *per se* approach of *Loretto* must be employed.

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[7] On August 14, 1989, in addition to appointing the FSLIC as conservator for Lincoln, the Board adopted a resolution that "one or more persons shall be designated as Special Representative of the Conservator" and shall have the authority "to take prompt possession of the books, records, property, and assets of every kind and description of Lincoln." (Board Resolution No. 89-1328 at 7 (Apr. 14, 1989).) Approximately one hour after the appointment, agents of the conservator entered Lincoln's head offices in California and served on Lincoln a letter informing it of the conservatorship. The letter stated that the conservator was "now taking possession of [Lincoln]" and would assume "all powers of [Lincoln's] members, officers, and directors . . . . No member(s), officer(s), or director(s) shall thereafter have or exercise any such . . . power . . . or act in connection with any of [Lincoln's] assets or property." The letter further threatened "criminal penalties for refusal to comply with the Conservator's demand for possession of the property, business, and assets of [Lincoln]."

On April 14, 1989, agents of the conservator also entered and took possession of Lincoln's offices in Los Angeles and several of its California branch offices. Shortly thereafter, agents of the conservator entered and took possession of Lincoln's offices in Phoenix, Arizona. These and other agents took control of Lincoln's operations, seized its files, and placed uniformed guards around the offices.

This argument misunderstands the rationale of *Loretto*. In *Loretto*, the Court adopted a *per se* approach because the government's actions interfered with the expectations that the property owners had (and in a typical situation would have) based on their ownership of a "physical thing." The Court explained that "property rights in a physical thing" involve the rights "to possess, use and dispose of [the thing]" and that government action that results in permanent occupation of physical property effectively destroyed each of these rights. *Id.* at 435, quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). The Court reasoned that "property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property," 458 U.S. at 436, and explained the intended narrow scope of its decision as follows: "Our holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking. In such a case the property owner entertains a historically rooted expectation of compensation . . . ." *Id.* at 441.

Loretto cannot properly be interpreted to cover situations such as the instant case where its rationale would not apply because the property owners could not reasonably have had such traditional expectations as to their ability "to possess, use, and dispose of" their property or as to their right to compensation. Herein, for the reasons set forth above, plaintiffs' and Lincoln's expectations as to the operation of Lincoln reasonably must have been rooted in the scope of the government's regulatory authority rather than in historical notions of the rights of owners of physical things. Clearly, plaintiffs and Lincoln could not reasonably have expected "that [they would] be relatively undisturbed at least in the possession of [their] property." *Id.* at 436. To the contrary, plaintiffs' expectations could only be that regulators would exert physical control over Lincoln's assets if the Board made a finding

that Lincoln was in "an unsafe or unsound condition to transact business."

Similarly, plaintiffs and Lincoln could not reasonably have had an "expectation of compensation," *id.* at 441, when the government made such a finding and appointed a conservator, and then a receiver, to take over Linco'n's assets. To the contrary, plaintiffs' expectations as to compensation in the event of an appointment of a conservator or receiver were defined in the pertinent statutes and regulations. In pertinent part, Lincoln could contest the appointments of the conservator and receiver in district court, *see supra* note 4, and was entitled to receive monies left over after required dispositions.[8]

VI.

As is apt to occur when a *per se* rule exists, plaintiffs' efforts herein have been directed primarily at squeezing the government's action into the language that the Supreme Court used in defining the *per se* rule in *Loretto*. Plaintiffs argue strenuously that the government's conduct on April 14, 1989, must be characterized as a permanent physical occupation of plaintiffs' property. Plaintiffs then argue, in effect, that because this action falls within the grasp of the magic words of the *per se* rule, the entire regulatory context in which the action was taken is irrelevant and must be ignored.

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[8] *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951), does not warrant a different result. Therein, the federal government sought to avert a nationwide strike of miners by taking over operation of "all mines producing coal in which a strike or stoppage has occurred or is threatened." *Id.* at 116. But in *Pewee* there was no established regulatory scheme analogous to the regulatory scheme in the instant action. Hence, in *Pewee*, like *Loretto* but unlike the instant case, the property owner had an expectation that it would be relatively undisturbed in its possession of the property and that it would receive compensation in the event the government took control of the property.

Based on the dictionary definitions of the terms, the government's actions herein can at least be argued to have resulted, incidently, in some degree of "physical occupation" of "a physical thing" and, in addition, that occupation can be argued in some sense to be "permanent." On April 14, 1989, in an effort to perform its statutory responsibilities with respect to a savings and loan association that it found to be in an unsafe and unsound condition, the government placed its own representatives physically in Lincoln's buildings, assumed physical control of Lincoln's assets, and apparently barred the old management from returning.[9] But *Loretto* should not be interpreted as building a wall around the dictionary definitions of the words "permanent physical occupation" through which the light of analysis and reason may not pass. The fifth amendment to the Constitution embodies very basic concepts concerning this nation's respect for private property and the relationship between a citizen and its government with respect to that property. In view of the very fundamental nature of the issues involved, *Loretto* cannot, and should not, be extended by mere analogy without careful analysis.

In *Loretto*, the Court departed from the standard ad hoc multifactor analysis typically employed in takings cases. But it did not do so because the standard multifactor analysis would have produced a different result. Rather, it so departed because the governmental action at issue so unambiguously offended the property interest protected under the fifth amendment that the ultimate outcome of the takings analysis was apparent. As explained above, the governmental action offended histori-

[9] Plaintiffs' allegation that the *per se* approach of *Loretto* applies because plaintiffs' property was subject to "permanent physical occupation" seems particularly remote for plaintiffs' second takings claim. For that claim, the property allegedly taken was the shareholders' "right to control" Lincoln. A "right to control" a corporation is not a "physical thing" and certainly cannot be "physically occupied."

cally rooted expectations that the owner of an apartment building had with respect to that property. It was in that context that the Court defined the character of the governmental action as the "permanent physical occupation" of property and ended its takings analysis.

But a similar definition of the ultimate character of the governmental action and a similar short cut of the takings analysis cannot be justified here. The *Loretto per se* approach should not facilely be extended in cases where the historically rooted expectations that underlie the *Loretto* decision do not remotely apply. The instant case involves a regulatory action in a highly regulated industry in which the government took actions that reasonably should have been expected by plaintiffs and Lincoln. It seems beyond any serious doubt that fairness and justice demand that these factors at least be considered when evaluating plaintiffs' fifth amendment takings claim. It similarly seems beyond doubt that these factors, once considered, are determinative and that no fifth amendment takings has occurred.

Conclusion

For the reasons set forth above, there are no material issues of fact in dispute and defendant is entitled to judgment as a matter of law. Accordingly, plaintiffs' motion for partial summary judgment is denied and defendant's cross-motion for summary judgment is granted. The Clerk of the Court is directed to dismiss plaintiffs' complaint. No costs.

IT IS SO ORDERED.

/s/ Roger B. Andewelt
ROGER B. ANDEWELT
Judge